

TITLE 3. DEPARTMENT OF PESTICIDE REGULATION
Pertaining to Respiratory Protection
DPR Regulation No. 06-002

NOTICE OF PROPOSED REGULATORY ACTION

The Department of Pesticide Regulation (DPR) proposes to amend sections 6000, 6720, 6738, and 6793, and adopt section 6739 of Title 3, California Code of Regulations (3 CCR). The proposed regulatory action pertains to respiratory protection worn by employees working with pesticide materials. In summary, the proposed action would revise the written respiratory protection program that employers must establish when employees are required by pesticide label, restricted materials permit, or regulation to use respirators in the workplace.

SUBMITTAL OF COMMENTS

Any interested person may present comments in writing about the proposed action to the agency contact person named below. Written comments must be received no later than 5:00 p.m. on June 26, 2006. Comments regarding this proposed action may also be transmitted via e-mail <dpr06002@cdpr.ca.gov> or by facsimile (FAX) transmission at (916) 324-1452.

A public hearing is not scheduled. However, a public hearing will be scheduled if any interested person submits a written request for a public hearing to DPR no later than 15 days prior to the close of the written comment period.¹

EFFECT ON SMALL BUSINESS

DPR has determined that the proposed regulatory action does affect small businesses.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

DPR's mission is to protect public health and the environment from adverse effects of pesticide use. The Food and Agricultural Code (FAC) requires that DPR adopt regulations that provide for safe working conditions for persons handling pesticides and working in and about pesticide-treated areas, including regulations on the subject of respirators and other protective devices.

Within the last few years, both the U.S. Department of Labor's (DOL's) Occupational Safety and Health Administration (OSHA) and, subsequently, the California Department of Industrial Relation's (DIR's) Division of Occupational Safety and Health (Cal/OSHA) have revised their respiratory protection regulations. DPR's existing respiratory protection regulations were patterned after DOL's former regulations. These DPR regulations are contained in section 6738(h) and consist of a two-page, eight-point list of requirements with which an employer shall

¹ If you have special accommodation or language needs, please include this in your request for a public hearing. TTY/TDD speech-to-speech users may dial 7-1-1 for the California Relay Service.

comply. Although considered protective, DPR needs to revise its respiratory protection regulations to maintain a respiratory program that is consistent with Cal/OSHA. DPR also recognizes that its compliance and protection would be increased from improved clarity.

The DIR regulations pertaining to respiratory protection are contained in Title 8 CCR, section 5144. Section 5144 is directly based on DOL's regulation found in the Code of Federal Regulations, Title 29, section 1910.134, Respiratory Protection.

DPR has considered incorporating by reference the DIR regulations contained in section 5144. However, the regulations in section 5144 may not have been intended to encompass agriculture. DPR believes that since section 5144 was meant to cover a majority of industries, its scope must be broad and encompassing. However, DPR's jurisdiction is confined only to the users of pesticides. Therefore, DPR is attempting to design regulations that are specific to the handling of pesticides. Hazardous conditions incidental to pesticide handling (e.g., entrance into a confined space environment for the purpose of making a pesticide application) are still rightly within the jurisdiction of DIR. Additionally, some of the principals of respiratory protection found in section 5144 (selection and use of a respirator based on the chemical and physical properties of the air contaminant, the levels of exposure, etc.) are already mandated by the U.S. Environmental Protection Agency-approved label requirements. The additional language in section 5144 not pertinent to pesticides is not included in the proposed text.

DOL's regulations were not intended or designed to cover pesticide-handling activities. Work sites where pesticides are handled are unique in comparison to other types of workplaces; thus the respiratory protection program should be designed to reflect these unique settings. The selection and use of respiratory protection is regulated through pesticide labeling. DOL's and DIR's programs require the employer to select and require the use of respirators based on the hazards at the work site. Based on the differences in these programs, DPR believes it is appropriate to design a separate respiratory protection program that is equivalent to the appropriate subsections of section 5144.

DPR proposes to add the following definitions to section 6000: "air-purifying respirator," "atmosphere-supplying respirator," "filter or air purifying element," "filtering facepiece," "immediately dangerous to life or health," "physician or other licensed health care professional," "qualitative fit test," and "quantitative fit test." These definitions are needed to clarify the proposed regulatory action in section 6739.

The proposed action would amend section 6720 (Safety of Employed Persons). When antimicrobial agents, used only as sanitizers, disinfectants, medical sterilants, or pool and spa chemicals are handled, the employer is exempt from complying with the provisions of section 6720(c), provided the employer instead complies with any applicable requirements in corresponding provisions of 8 CCR. The proposed action would strike the reference to 3 CCR section 6738 and the corresponding reference to 8 CCR sections 3380 through 3385, and 5144 from the list in section 6720.

DPR's proposed new 3 CCR section 6739 is very similar to the existing DIR regulations in 8 CCR section 5144, but it has been crafted with language designed to meet the needs of California employers who must establish respiratory protection programs for the safety and protection of their employees that work with pesticides. This proposed section would require the employer to identify a physician or other professional licensed health care provider (PLHCP) to perform a medical evaluation prior to requiring an employee to use a respirator. The medical evaluation begins with the employee confidentially completing a medical questionnaire or providing employees with an initial medical examination that covers the same material. The PLHCP determines if a medical examination is necessary and if the employee is physically fit to wear respiratory protection. The employer is required to obtain a written recommendation from the PLHCP regarding an employee's ability to use a respirator.

The proposed action would also delete subsection (h) from section 6738 since proposed section 6739 would contain DPR's regulations pertaining to respiratory protection. Existing subsection (i) would then be designated as new subsection (h). An informational note for section 6738(e) would also be deleted. In addition, DPR proposes to make necessary changes to references in section 6793 as a result of proposed amendments in section 6738.

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts, nor does it require reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of section 6 of Article XIII of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action.

COSTS OR SAVINGS TO STATE AGENCIES

DPR has determined that no savings or increased costs to any State agency will result from the proposed regulatory action.

EFFECT ON FEDERAL FUNDING TO THE STATE

DPR has determined that no costs or savings in federal funding to the State will result from the proposed action.

EFFECT ON HOUSING COSTS

DPR has made an initial determination that the proposed action will have no effect on housing costs.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESSES

DPR has made an initial determination that adoption of this regulation will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

DPR has made an initial determination that the adoption of this regulation will not have a significant cost impact on representative private persons or businesses. The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

The proposed regulation essentially writes into 3 CCR the respirator safety regulations which already are effective under Cal/OSHA's 8 CCR provisions. Thus, most agricultural applicators should have in place the provisions related to training, use, supervision, and reporting that are included in the current proposed regulation. The proposed regulation does add some new provisions in these areas, particularly in mandating an updated training program. The total cost of these updated programs is expected to be minor.

The California Employment Development Department reports that approximately half of the 450,000 agricultural workers are employed in the production of fruits and vegetables during the summer, the peak employment season. There are approximately 74,000 farms in California, but only about 44,000 reported use of pesticides in 1997 (U.S. Census of Agriculture, 1997). DPR staff estimate that 6,033 of the agricultural workers use respirators that fall under the provisions of these regulations, and that these workers are employed by 3,183 businesses.

The proposed regulation could affect roughly three percent of the agricultural workers and up to five percent of the farms. Some of the agricultural enterprises affected by the proposed regulation perform contract work that requires the use of respirators and the number of these workers is difficult to establish. Thus, to simplify the calculations used in this economic analysis, it will be assumed that there are 6,000 affected workers, and 3,200 affected businesses.

As a brief summary, in the initial year of the regulation, all 6,000 California agricultural workers subject to the regulation would be required to undergo a physical examination. However, under the assumption that about half of these workers already participate in annual examinations by a physician, the provision would only apply to 3,000 additional workers. Other minor costs resulting from this regulation--updated written programs, training, documentation, recordkeeping, and evaluation--occur primarily in the first year of the regulation, and represent about 30 percent of the total first-year cost. The combined expected first-year cost is estimated to be \$700,000, or approximately \$117 per worker.

Since most of the overall cost of the proposed regulation is related to the new requirement for physical examination by a PLHCP, the frequency of these examinations is a significant

determinant of the estimated on-going cost. It is assumed that these examinations will be required on average only every three years. Thus, the eventual annual additional cost due to this provision of the proposed regulation would be about \$155,000. The ongoing cost, after the third year, is estimated to be \$180,000, or approximately \$30 per worker.

IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS

DPR has determined it is unlikely the proposed regulatory action will impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business with the State of California.

CONSIDERATION OF ALTERNATIVES

DPR must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory action.

AUTHORITY

This regulatory action is taken pursuant to the authority vested by FAC sections 11456, 11502, 12111, 12781, 12976, 12981, and 14005.

REFERENCE

This regulatory action is to implement, interpret, or make specific FAC sections 11408, 11410, 11501, 11701, 11702(b), 11704, 11708(a), 12042(f), 12103, 12971, 12972, 12973, 12980, 12981, 13145, 13146, and 14006.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

DPR has prepared an Initial Statement of Reasons, and has available the express terms of the proposed action, all of the information upon which the proposal is based, and a rulemaking file. A copy of the Initial Statement of Reasons and the proposed text of the regulation may be obtained from the agency contact person named in this notice. The information upon which DPR relied in preparing this proposal and the rulemaking file are available for review at the address specified below.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the close of the comment period, DPR may make the regulation permanent if it remains substantially the same as described in the Informative Digest. If DPR does make changes to the regulation, the modified text will be made available for at least 15 days prior to adoption. Requests for the modified text should be addressed to the agency contact person named in this

notice. DPR will accept written comments on any changes for 15 days after the modified text is made available.

AGENCY CONTACT

Written comments about the proposed regulatory action; requests for a copy of the Initial Statement of Reasons, the proposed text of the regulation, and a public hearing; and inquiries regarding the rulemaking file may be directed to:

Linda Irokawa-Otani, Regulations Coordinator
Department of Pesticide Regulation
1001 I Street, P.O. Box 4015
Sacramento, California 95812-4015
(916) 445-3991

In the event the contact person is unavailable, or questions on the substance of the proposed regulatory action, particularly technical or historical questions concerning the respiratory protection regulations, may be directed to:

Harvard Fong, Senior Industrial Hygienist
Worker Health and Safety Branch
Department of Pesticide Regulation
(916) 445-4211

This Notice of Proposed Action, the Initial Statement of Reasons, and the proposed text of the regulation are also available on DPR's Internet Home Page <<http://www.cdpr.ca.gov>>.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons mandated by Government Code section 11346.9(a) may be obtained from the contact person named above. In addition, the Final Statement of Reasons will be posted on DPR's Internet Home Page and accessed at <<http://www.cdpr.ca.gov>>.

DEPARTMENT OF PESTICIDE REGULATION

Director

Date